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IN THE

Supreme Court of the United States

October Term, 1971

No. 35977

ESTATE OF ESTHER ZAHN,
Deceased.
MARGARET ZAHN, PAUL ZAHN and OTTO ZAHN,
Plaintiffs and Appellants,
vs.
SECURITY PACIFIC NATIONAL BANK, Executor, THE SALVATION ARMY, and THE STATE OF CALIFORNIA,
Defendants and Respondents.

PETITION FOR CERTIORARI TO THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION 4, STATE OF CALIFORNIA.

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WESTERN PRINTING COMPANY, WHITTIER—OXBOW 8-1722

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PETITION FOR CERTIORARI TO THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION 4, STATE OF CALIFORNIA.

To the Honorable Warren Burger, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioners, the heirs at law of Margaret Zahn, deceased, respectfully petition this court for a writ of certiorari, directed to the Court of Appeal,

Second Appellate District, Division Four, State of California, to review and reverse a degree of distribution which construes the holographic will of the decedent to provide for housing with a restricted religious and racial covenant and a covenant restricting occupancy "to women, to native Californians and to Christian women and girls who have no relatives, no smokers or drinkers, only deserving citizens who are native Californians."

Although the will was non-charitable on its face, the California courts construed it as having a general charitable intent, rewrote the will as did the Secretary of the Interior in Tooahnippah, petitioner, v. Walter J. Hickel, secretary of the Interior 25 (L. ed) (2) 600, and gave the property to the Salvation Army, amounting to about $700,000, depriving the heirs at law of it.

The courts below also ignored the challenges of the heirs at law that the provisions of the will requiring the proposed housing to have restrictive covenants limiting their use to women and girls of the Christian faith and to native Californians violated the commerce clause and fair housing laws guaranteed by the United States Constitution, by the due process and equal protections clauses of the Fourteenth Amendment U.S. Constitution, and by Section 53 of the California Civil Code.

The California courts implicitly held that these holdings were not against public policy, and that the

will, as thus construed and applied, did not violate the fair housing act of the United States, nor due process of law or the equal protection of the laws guaranteed by the Fourteenth Amendment U. S. Constitution. It arbitrarily and capriciously took the property and gave it to the Salvation Army, a proselyting organization for the Christian religion.

JURISDICTION

Jurisdiction is conferred by Title 28, Section 1257, U. S. Codes, and the Rules of the Supreme Court of the United States.

The judgment of the Court of Appeal was rendered on March 18, 1971. Thereafter a petition for rehearing was duly and regularly filed in that court and denied by that court on April 7, 1971.

Thereafter, a petition for hearing was filed in the Supreme Court of California and the Supreme Court extended the time within which to rule on the petition to June 16, 1971. The Supreme Court actually denied the petition for hearing on May 26, 1971.

This petition for writ of certiorari is being filed herein within 90 days of the court's order denying a hearing.

OPINION BELOW

The opinion of the Court of Appeal, Second Appellate District, Division Four, State of California, is contained in Appendix A hereof and incorporated herein by reference. Also the petition for hearing in the Supreme Court of California containing the challenges to violations of federal Constitutional rights which the State denied.

A certified copy of the order of the Supreme Court of California is contained herein as follows:

Order Due
June 16, 1971

ORDER DENYING HEARING

AFTER JUDGMENT BY THE
COURT OF APPEAL
2nd District, Division 4, Civil No. 35977
IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA
IN BANK

ESTATE OF ZAHN, Deceased;
SECURITY PACIFIC NATIONAL BANK,
AS EXECUTOR, ETC.
v.
ZAHN ET AL.

Appellants' petition for hearing DENIED.

[Filed May 26, 1971, G. E. Bishel, Clerk, S.F. Deputy].

I, G. E. BISHEL, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court as shown by the records of my office.

Witness my hand and the seal of the Clerk this 20th day of August, A.D., 1971.

Clerk
By R. JOHNSON, Deputy Clerk
WRIGHT, Chief Justice

THE FACTS

Esther Zahn, a single lady of astute financial ability, and perhaps with a religious prejudice against non-Christians and men, amassed a fortune of $622,-523.13 consisting of cash, notes secured by trust deeds and real estate. This has increased since her death to about $700,000.

She lived in a house at 3503 South Flower street, Los Angeles, about a block from the University of Southern California. Her father and mother had lived there before her.

She wrote a holographic will in which she said she wanted to have a rest home started on the property for women and girls "who were Christians" only with no relatives and who were native Californians. The proposed housing had restrictive covenants excluding males, non-Christians, women and girls with relatives, women who smoked or drank or were not native Californians.

Before Miss Zahn died, August 3, 1967, the Hoover Redevelopment project for the University of Southern California designated her property, along with others for their acquisition. Miss Zahn had visited the agency and apparently submitted some prospectus to rebuild on her property but never went forward with her plans before she died. The redevelopment agency acquired her property.

On May 31, 1968 Mr. Marcus Muskat, attorney, on behalf of the executor, filed a petition to determine

interest in the estate (R.T. 48). The heirs at law live in Germany. They filed their statement of interest and attorney H. A. Gebhardt, an expert on German law, gave his opinion that the heirs at low could receive the property from the United States from California. (*Zschernig v. Miller,* 389 U.S. 429, 19 L.ed. 2d 688) (R.T. 59). Thereafter this issue did not arise.

What did arise thereafter was whether the will contained provisions to build housing only to be rented and occupied by women and girls, only of Christian faith and religious restrictive covenants. Whether such provisions void the will as being in violaton of the due process and equal protections clauses of the Fourteenth Amendment and in violation of Section 53 of the California Civil Code and further whether the will containing these provisions had a general charitable disposition and entitled the trial Judge to substitute his opinion for the specific provisions of the will.

The Salvation Army intervened and became a party in the action. They were not an heir nor was the Attorney General. On its face, the will contains no charitable intent or disposition and only names a bank as executor.

Under the law of the State of California, when property is taken for a public use Section 2279 of the Civil Code extinguishes a trust by "such object becoming impossible or unlawful."

The issues involving the violation of U. S. constitutional rights of the petitioners were raised throughout the trial and in the Court of Appeal and the challenges of each were denied by the Court of Appeal and by the Supreme Court of California.

Esther Zahn's holographic will of 1960 of two pages on May 12, 1960, in a firm handwriting. This holographic will reads as follows:

THE HOLOGRAPHIC WILL

I, Esther Zahn of 4701 Keniston Ave. Los Angeles, California, make and publish this is my last will and Testament as follows:

I revoke all other wills and Codicils heretofore made by me and appoint the Farms Merchants National Bank, corner 4th and Main St., Los Angeles, Cal. as Executor of this will.

I want to *start* a Rest Home at the corner 3503 So. Flower St. Los Angeles, California for *Christian women and girls* who have no relatives, no smokers or drinkers only deserving citizens who are Native Californians. Perhaps the Salvation Army can recommend them. I would like a new Modern Building to be erected at the corner of 3503 So. Flower St. Los Angeles, Cal to be called "The Zahn Memorial." This in memory of my father and mother Paul and Louisa Zahn who came to Los Angeles Cal in 1887. There are enough 1st Trust Deeds and real Estate to sell and money to start a new Building.

My home at 4701 Keniston Ave., Los Angeles, Cal. not to be sold. I wish to will to the Salvation Army to be used as a Music Home for Deserving *Christian Students* in my memory.

Have relatives in Germany. Only 1st 2nd and 3rd Cousins. I will them Care Packages or $10 per month as long as they live, if they need help.

August Manson, my caretaker at 4701 Keniston Ave., Los Angeles, Cal. $5,000 cash. He takes care of my 10 Birds and One Dog Misty Fox Terrier.

Executed at Los Angeles, California, this 12th Day of May, 1960.

Esther Zahn

The petitioners incorporate by reference the matters and argument set forth in the petition for hearing in the Supreme Court of California and also arguments in the appendix in the Court of Appeal.

QUESTIONS PRESENTED

1. Whether a will leaving money and property for housing to be built after death which contains restrictive covenants as to the use of the housing, limiting such use solely to Christian women, who do not smoke or drink and who are native Californians, is void because the restrictive provisions are contrary to U. S. Constitutional provisions Article 1, Section 8, Sub 3 of the Commerce Clause (*Atlanta Motel vs.* U. S. 379 U.S. 241) and the due process and equal

protection clauses of the Fourteenth Amendment. U. S. Constitution.

2. Whether the restrictive covenants set forth in the will in the housing project or rest home desired by Miss Zahn to be built on her property was State action through the courts within the meaning of the Fourteenth Amendment to the Constitution of the United States and the Fair Housing provisions of the Civil Rights Act of 1964 and therefore in violation of United States Constitution, Article I, Section 8, Subdivision 3 of the Commerce Clause (*Atlanta Motel v. U.S.*, 379 U.S. 241, 13 L.ed. 2d 258) and renders the will void in violation of the Constitution and Laws of the United States.

3. Whether the Court may rewrite such a will containing restrictive covenants or whether such proceedings takes property from the heirs at law without due process of law and equal protection of the law contrary to the Fourteenth Amendment of the Constitution of the United States.

4. Whether such a will limits housing to Christian women and girls is a restrictive covenant barring Jewish women, oriental non-Christian women, non-Christian American Indians, Hindus, and many others non-Christians that could be listed, violate due process.

5. Whether the provisions in the will to provide for commercial, non-charitable housing containing such restrictions also violate Section 53 of the Civil

Code of California and therefore also violates the Fourteenth Amendment to the Constitution of the United States.

6. Whether the taking of the property at 3503 South Flower Street by the Hoover Redevelopment Agency for the University of Southern California and the zoning restrictions regarding 4701 Keniston Avenue, Los Angeles, were governed by Section 2279 of the Civil Code of California, eliminating a trust, if one was intended by the will.

7. Whether the provisions of the will on its face are non-charitable and therefore not subject to being rewritten or taken by a trial Judge from the heirs and given to the Salvation Army.

8. Whether the provisions in the will are so limited to Christian women and native Californians "who do not smoke or drink and who are deserving citizens" that it shows that no general charitable intent was intended and is too limited to constitute a general charity.

9. Whether carrying out or ignoring the terms of the will are state action within the meaning of the Fourteenth Amendment to the Constitution of the United States.

10. Whether the provisions of the will require a structure to be built and restrictions are contrary to public policy and therefore in violation of the due process and equal protections clauses of the Fourteenth Amendment to the Constitution of the United States.

The Hoover Redevelopment order for the taking of the property at 3503 South Flower Street occurred in 1966 and Miss Zahn sought to program a building for the redevelopment of the same but did not pursue it. The Flower Street house was sold for $47,500 and the proceeds added to the rest of the estate. Another property of hers located at 4701 Keniston Avenue, Los Angels, was zoned solely for residence (R.T. 95) and was no longer available as a music center or school as designated by Miss Zahn. The Salvation Army offered to put up a plaque in one of its buildings in Glendale acknowledging the donation from Miss Zahn for the sale of the property.

The heirs at law, through their counsel, also asserted that since no charitable trust was created and a bank was named as executor, and the restrictive covenants voided the will, neither the Salvation Army nor the Attorney General had standing or a right to intervene.

REASONS FOR GRANTING THE WRIT

This case raises important U.S. constitutional and statutory provisions of law in reference to the making and the provisions of a will and its later construction by the courts after the death of the testator.

If a testator makes provisions in his will which are in violation of the Constitution of the United States or the statutes of the state or United States, may the court rewrite the will to its own ideas or has the testator died intestate?

Here the testatrix placed in her will covenants which were plainly racially and religiously restrictive. As such they are against public policy and the Constitution and statutes by provision regarding restrictive covenant and voided the will. The court below chose to rewrite the will ignoring the invalidity which these covenants rendered the will and instead substituted the Salvation Army, a Christian religion proselyting organization in place of the heirs at law who would take it under the California statutes of intestacy.

The Court of Appeal of California seemed to distinguish the restrictive provisions of this lady's will from the restrictive provisions of the will of Senator Bacon of Georgia (*Evans v. Abney,* 396 U.S. 435, 24 L.ed. 2d 634) where the Court held that the will of Senator Bacon involved discrimination between white and black people. This case involves racial and religious discriminations and limitations to Californa Caucasian nativity. Such distinctions make it look like Tweedledee and Tweedledum. Each is a violation of the Constitution and laws of the United States. One discriminates against color; the other agains religion.

In *Evans v. Abney,* 396 US 435, 443, 444, 2d L.ed. 2d 634, 643, the Supreme Court said:

> "No state law or act can prevail in the face of contrary federal law, and the federal courts must search out the fact and truth of any proceeding or transaction to determine if the Consti-

tution has been violated. Presbyterian Church v. Hull Church, 393 US 440, 21 L.ed. 2d 658, 89 S. Ct. 601 (1969); New York Times Co. v. Sullivan, 376 U.S. 254, 11 L.ed. 2d 686, 84 S.Ct. 710, 95 ALR 2d 1412 (1964)."

Also, in the same case the Court points out that Georgia has a cy pres statute. (396 U.S. 435, 440, 441, 24 L.ed. 2d 634, 641) California has no cy pres statute as such. Section 2279 of the Civil Code governs instead.

In the Evans case the Supreme Court said (396 US 435, 441, 442, 24 L.ed. 2d 634, 641, 642):

"But this underlying logic of the cy pres doctrine implies that there is a certain class of cases in which the doctrine cannot be applied. Professor Scott in his treatise on trusts states this limitation on the doctrine of cy pres which is common to many States is as follows:

"'It is not true that a charitable trust never fails where it is impossible to carry out the particular purpose of the testator. In some cases . . . it appears that the accomplishment of the particular purpose and only that purpose was desired by the testator and that he had no more general charitable intent and that he would presumably have preferred to have the whole trust fail if the particular purpose is impossible of accomplishment. In such a case the cy pres doctrine is not applicable.' 4 A. Scott, Law of Trusts § 399, p. 3085 (3d ed 1967).

"In this case, Senator Bacon provided an un-

> usual amount of information in his will from which the Georgia courts could determine the limits of his charitable purpose. Immediately after specifying that the park should be for 'the sole, perpetual and unending, use, benefit and enjoyment of the white women, white girls, white boys and white children of the City of Macon.' the Senator stated that 'the said property under no circumstances . . . (is) to be . . . . at any time for any reason devoted to any other purpose or use excepting so far as herein specifically authorized.' "

Likewise, in the case before this Court it is clear that there was a limited specific intent by Miss Zahn to have a "rest home" as a memorial to her father and mother and a place that she might herself live in a penthouse and that the residence of the place be restricted to *Christian* women and girls who have no relatives, no smokers or drinkers, only deserving citizens who are native Californians. (Par. 3 of the will.)

Like Senator Bacon, Miss Zahn's intent was not charitable and not general, but extended only to the establishment of a restricted residence for the benefit solely of Christian women and girls who have no relatives, no smokers or drinkers, only deserving citizens who are native Californians. Contrary to the finding in the Georgia case, the California court nevertheless wrote into the will a general charitable intent so as to be able to rewrite the will and donate the property to the proselyting Christian Salvation

Army and thus deprives Miss Zahn's relatives of property to which they were entitled.

In addition, the house at 3503 South Flower Street and the land were designated as the exclusive source of payment of the legacy and the gift was therefore specific and when the property was taken by the Hoover Redevelopment there was nothing left and the property was adeemed. (*Estate of Sullivan,* 128 Cal. App. 2d 144, 274 P. 2d 946). In the *Sullivan* case the court said: "Where the proceeds of a particularly designated land are the actual subject of the bequest or where certain land is designated as the exclusive source for the payment of a legacy, the gift is specific. 57 Am. Jur Wills, Sec. 1413."

Ademption is one of the ways a legacy lapses. (*Kramer v. Kramer,* 201 F. 248, 250.)

Instead the Court rewrote the will and took the proceeds and gave it to the Salvation Army, a Christian religious proselyting organization. This violated due process and equal protection forbidden under the 14th Amendment U.S. Constitution and the U.S. Civil Rights Act. of 1964.

WHEREFORE, petitioners pray that this Honorable Court grant certiorari and reverse the judgment.

Respectfully,

MORRIS LAVINE
Attorney for Petitioners

APPENDIX "A"

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

ESTATE OF ESTHER ZAHN, Deceased.	
MARGARET ZAHN, PAUL ZAHN, and OTTO ZAHN, Plaintiffs and Appellants, vs. SECURITY PACIFIC NATIONAL BANK, Executor, THE SALVATION ARMY, and THE STATE OF CALIFORNIA, Defendants and Respondents.	Civ. No. 35977 S.C. # P-525814

[Filed Mar. 18, 1971, Court of Appeal, Second Dist., Clay Robbins, Jr., Clerk.]

APPEAL from a judgment and orders of the Superior Court of Los Angeles County. McIntyre Faries, Judge. Affirmed.

Morris Lavine, for Plaintiffs and Appellants.

Marcus Muscat and Meserve, Mumper & Hughes for Respondents Security Pacific National Bank and The Salvation Army.

Thomas C. Lynch, Attorney General and Lawrence R. Tapper, Deputy Attorney General for Respondent State of California.

Margarete Clara Zahn (also known as Margaret Zahn), Paul Zahn and Otto Zahn, three first cousins of the decedent who reside in Germany, appeal from the judgment (Decree Determining Interest in Estate) or order of distribution.[1]

Esther Louisa Zahn, a lifelong spinster, died on August 3, 1967, leaving an holographic will dated May 12, 1960, which was duly admitted to probate on September 1, 1967. Security Pacific National Bank (formerly Security First National Bank, previously known as Farmers and Merchants National Bank) was appointed executor of her estate which had an approximate value of $600,000 to $700,000 principally in real estate and trust deeds on real estate. Petitions to determine interests in the estate were filed by the executor, by the three appellants claiming to be the decedent's heirs at law, by the Salvation Army, and by the Attorney General of the State of California. (Prob. Code § 1080.)

The will by its terms provides as follows:

"I, Esther Zahn of 4701 Keniston Ave., Los Angeles, California make and publish this my last will and Testament as follows:

---

[1]Their attempted appeal "from the orders denying the motion for a new trial and for a new and separate judgment" is dismissed because these orders are not separately appealable but are reviewable upon appeal from the judgment.

"I revoke all other wills and Codicils heretofore made by me and appoint the Farmers Merchants National Bank corner 4th and Main St., Los Angeles, Cal. as Executor of this will.

"I want to start a Rest Home at the corner 3503 So. Flower St. Los Angeles, California for Christian women and girls who have no relatives, no smokers or drinkers only deserving citizens who are Native Californians. Perhaps the Salvation Army can recommend them. I would like a new Modern Building to be erected at the corner of 3503 So. Flower St Los Angeles Cal to be called 'The Zahn Memorial.' This in memory of my father and mother Paul and Louisa Zahn who came to Los Angeles, Cal in 1887. There are enough 1st Trust Deeds and Real Estate to sell and money to start a new Building.

"My home at 4701 Keniston Ave Los Angeles, Cal not to be sold. I wish to will to the Salvation Army to be used as a Music Home for Deserving Christian Students in my memory.

"Have relatives in Germany. Only 1st 2nd and 3rd Cousins. I will them Care Packages or $10 per month as long as they live, If they need help.

"August Hansen, my caretaker at 4701 Keniston Ave Los Angeles, Cal. $5000 cash. He takes care of my 10 Birds and One Dog Misty Fox Terrier.

"Executed at Los Angeles California this 12th Day of May 1960. Esther Zahn"

The trial court received oral evidence in support of the contention of the Salvation Army that the de-

cedent intended to make a charitable gift of all trust deeds, real estate, and money not otherwise specifically bequeathed to other named heirs to The Salvation Army as trustee to carry out the charitable purposes of her will; that The Salvation Army was the intended devisee of the decedent's home; and that the cy pres doctrine applied to impress the Flower Street property and implementing funds with a trust to establish and maintain a music home for Christian students in memory of Esther Zahn.

Thereupon the trial court determined that the will evinced a general charitable intent and ruled that August Hansen should receive $5,000 in cash; that appellants and the decedent's six other living relatives should each receive $10 per month for life or until he or she is no longer in need; that the Salvation Army should receive the decedent's home on Keniston impressed with a charitable trust to stablish a music home for deserving Christian students upon an appropriate site; that the Salvation Army be appointed trustee to receive and to use the proceeds from the first trust deeds, real estate and money in the estate to establish a rest home for native Californian Christian women and girls who are without relatives and who neither smoke nor drink, the home to be named "The Zahn Memorial."

Plaintiffs do not dispute that portion of the decree directing cash distribution to August Hansen, to appellants and to the six remaining relatives surviving.

Plaintiffs, however, contend as follows: (1) the gift of property at 3503 South Flower Street) together with cash proceeds of trust deeds and real estate) constitutes a specific gift which adeemed; (2) the gift of the decedent's residence is a specific gift which adeemed; (3) in the absence of a residary clause, the adeemed gifts pass intestate with the residue of Miss Zahn's estate; (4) because the charitable gift would deprive the state of inheritance taxes; the intervention of the Attorney General on behalf of the charitable interests is improper; (5) gifts to religious institutions which are exempt from taxes violate the Fourteenth Amendment of the federal Constitution and the trial court's determination as to the charitable gifts violates Civil Code section 2279; (6) the trial judge acted without jurisdiction; (7) the motions of the heirs for different judgment (Code Civ. Proc. § 663) and for new trial were improperly denied. For the first time on appeal, appellant argues that the testamentary gifts to the Salvation Army are invalid in that they purport to forbid or restrict the use or occupation of real property because of the user's religion in violation of due process and equal protection of the law as guaranteed by the Fourteenth Amendment of the Constitution of the United States and as prohibited by Civil Code, section 53. We conclude that appellants' contentions are devoid of merit.

Esther Zahn never married, lived alone for over 30 years after the death of her parents, and left no surviving relatives in this country. During her life-

time she had sent Care packages periodically to her "distant relatives," first, second and third cousins who lived in East and West Germany with whom she had not corresponded for four years prior to her death.

The decedent devoted substantial time to charitable and community work and especially engaged herself with projects of the Salvation Army, for which she had supreme respect. Esther Zahn loved music, belonged to her church choir, supported the training of young opera artists and wanted the Salvation Army to have the use of her Keniston Avenue home for band practice. She loved her deceased parents, particularly her father whose business acumen she successfully cultivated and perpetuated in her own life, and she wished to commemorate them with an appropriate memorial. She neither smoked nor drank alcoholic beverages and she was concerned about the situation of young girls who came alone to Los Angeles and who needed a place safe to live while working or attending school. During the early 1960's she planned a building which she wished to have erected on the site of her parents' former home to establish a residential haven for young women which would be operated by the Salvation Army. However, the property lies within the Hoover Urban Development project and after Miss Zahn's death the property was sold to the Hoover Redevelopment Agency. It was stipulated that the Redevelopment Agency had jurisdictional authority to condemn and take the property and to provide for its use and to

dispose of it or permit it to be used for purposes which it may determine at the time of disposal or use. No specific use was assigned to this particular piece of property by the time of trial but its tentative zoning was at variance with the establishment of the proposed rest home.

The Salvation Army was conceived in London about 134 years ago to aid homeless women and children in the severe economic hardships following the Industrial Revolution. The organization qualifies under its articles of incorporation to receive the testatrix' gifts and to administer them in accordance with the wishes expressed in her will. Its services are available to all religious and ethnic groups, but members are prohibited from smoking and drinking and it is willing to undertake the administration of the decedent's estate in keeping with her expressed intentions. In fact, there was testimony that the organization was planning to expand facilities for its "Women's Emergency Home" in Los Angeles before it learned of the existence of this estate. Brigadier Taylor of the Salvation Army testified that the organization proposed to erect and furnish a new building on another site, that they would charge no trustee's fee for administering the Zahn estate for this purpose, that they would pay the operating costs and would name the building "The Zahn Memorial" in memory of the decedent's father and mother. They proposed to give preference to the class of persons described in the decedent's will al-

though they would not turn away others in need while the facilities were not fully utilized.

Since the Keniston Avenue home property is presently zoned R-1 and a music home is not a permissible use thereunder the Salvation Army proposed that the proceeds from its sale be used to construct a music conservatory at the site of Upland College, which is destined to become a training school for Salvation Army officers; alternatively the proceeds might be used to endow a music room presently being constructed as part of the Salvation Army's Glendale Neighborhood Corps Center.

Appellant's first three assignments of error involve the same issue: Were the gifts of the Flower Street and Keniston Street residences and the assets designated for use incidental thereto, specific gifts which were adeemed, or does the doctrine of *cy pres* apply to preserve the testatrix' charitable intentions and prevent these assets from passing intestate with the residue?

There is no evidence in the record and no specific portion of the reporter's transcript is referred to in support of the appellants' declaration that the decedent knew before the date of her death that the Flower Street property would be taken by the Hoover Redevelopment Agency and would thus become unavailable for the use proposed by her will. Miss Zahn died August 3, 1967, and the property was not acquired by the agency until April 10, 1969. "'"Ademption of a specific lega-

cy is the extinction or withdrawl of a legacy in consequence of some act of the testator equivalent to its revocation, or clearly indicative of an intention to revoke. The ademption is effected by the extinction of the thing or fund bequeathed, or by a disposition of it subsequent to the will which prevents its passing by the will, from which an intention that the legacy should fail is presumed.'" [Citation.] A change in the form of property subject to a specific testamentary gift will not effect an ademption in the absence of proof that the testator intended that the gift fail. [Citations.]" (*Estate of Manson,* 62 Cal.2d 213, 215.)

The record is replete with evidence and testimony extrinsic to the will which supports the trial court's finding that the testatrix demonstrated a general charitable intention in establishing these gifts. "The fact that the . . . [testatrix] may have been motivated by a desire to perpetuate the memory of named persons does not necessarily destroy the charitable character of the bequest. [Citations.]" (*Estate of Mayer,* 237 Cal.App. 2d 549, 552.) In view of the trial court's determination, the gifts do not fail because the charitable plan of disposition outlined in the will is impossible, but the application of the doctrine of *cy près* is justified to preserve the testatrix' charitable purposes. Since neither of the parcels of real property is presently suitable for carrying out the testatrix' declared intentions, the court properly directed that her charitable purpose be given effect at some other suitable locations. "It being established that the bequest actually is a charitable one, it becomes the duty of the court, if possible, to apply *cy*

pre." (*Estate of Faulkner,* 128 Cal.App.2d 575, 579.) The purpose of the application of the *cy pres* doctrine is to prevent the failure of valid charitable trust gifts. (*Estate of Tarrant,* 38 Cal.2d. 42, 48-49.)

Appellants next contend that the Attorney General lacked standing to intervene on behalf of the charitable institution since a determination of charitable intention reduces the amount of inheritance taxes to be paid the state. Not only does public policy actually favor charitable gifts but the state acts in *parens patriae* with respect to the management of public charities and trusts through her attorney general (*People v. Cogswell,* 113 Cal. 129, 136) and the attorney general is a necessary party to proceedings affecting the disposition of charitable trust assets. (*In re L. A. County Pioneer Siciety,* 40 Cal.2d 852, 861.) Moreover, ". . . where there is any question of validity of a purported charitable trust in a will, it would seem that there is an *a fortiori* reason for the Attorney General's participation, since it is only he who, representing the public which benefits by a charitable trust, will or can act as advocate in support of the validity of the charitable provision." (*Estate of Ventura,* 217 Cal.App.2d 50, 57.)

Plaintiffs further contend that the gift to forward the purposes of a tax exempt religious organization is prohibited by the Fourteenth Amendment to the federal Constitution. This objection is argued on the ground that the Salvation Army is discriminatory and is dedicated to proselytizing the conversion of persons to the Christian religion. The cases cited by appellants

treat the issue of racial segregation restrictive covenants on the use of porperty dedicated to a municipality on trust (*Evans v. Abney,* 396 U.S. 435; *Evans v. Newton,* 382 U.S. 296). These decisions establish that because racial segregation constituted an inseparable element in the testator's intent, the trust failed and in the absence of alternative provisions, the trust property reverted to the testator's heirs.

Appellants argue on the ground that the restriction on use of the testatrix' property is invalid and renders the charitable bequest void or lapsed. Civil Code section 2279, however, has no application to the present case. "The rule of *cy pres* is one of construction, the object of which is 'to permit the main purpose of the donor of a charitable trust to be carried out as nearly as may be where it cannot be done to the letter.' (14 C.J.S., p. 512, § 52.) A trust ceases if the object becomes impossible or unlawful. (Civ. Code § 2279.) 'If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor.' [Citation.]" (*Society of California Pioneers v. McElroy,* 63 Cal. App.2d 332, 337.) The trial court in the present case found that the facts establish the testatrix' intention to make a general charitable bequest entitled to be

saved by the application of the *cy pres* doctrine, and that the creation of the trust is neither prevented nor does it laps pursuant to Civil Code section 2279 or any other legal theory.

The trial court had no opportunity to consider the contention raised by appellants for the first time on appeal that the proposed charitable gifts of the testatrix to benefit Christian women and deserving Christian music students, respectively, constitute invalid religious restrictions under Civil Code, section 53[1] and the Fourteenth Amendment. Section 53 of the Civil Code was repealed in 1959 and was reenacted with relevant subsections (a) and (b) in their present form as part of the Unruh Civil Rights Acts (Civ. Code §§ 51-53), dealing with public accomodations and housing. Basically, Civil Code section 53, inter alia, voids every provision in a written instrument relating to real property which purports to *forbid or restrict* the transfer or use of real property because of the user's or occupier's religion. In our judgment, there is nothing in Civil Cide section 53 nor in the Fourteenth Amendment which

[1] "(a) Every provision in a written instrument relating to real property which purports to forbid or restrict the conveyance, encumbrance, leasing, or mortgaging of such real property to any person of a specified race, color, religion, ancestry, or national origin, is void and every restriction or prohibition as to the use or occupation of real property because of the user's or occupier's race, color, religion, ancestry, or national origin is void.

"(b) Every restriction or prohibition, whether by way of covenant, condition upon use or occupation, or upon transfer of title to real property, which restriction or prohibition directly or indirectly limits the acquisition, use or occupation of such property because of the acquirer's, user's, or occupier's race, color, religion, ancestry, or national origin is void.

"(c) In any action to declare that a restriction or prohibition specified in subdivision (a) or (b) of this section is void, the court . . . takes judicial notice of the recorded instrument or instruments containing such prohibitions or restrictions in the same manner that it takes judicial notice of the matters listed in Section 452 of the Evidence Code."

applies in the case at bench, even if it be assumed that the will or the probate decree is "a written instrument relating to real property" within the meaning of the statute. There is nothing in the testamentary disposition of the will which forbids or restricts the use of real property because of the user's or occupier's religion. It is, of course, true that the devisee is a religious institution and the purpose of the testatrix was to (1) start a rest home for *Christian* women and girls, etc. and (2) will her home "to be used as a music home for deserving *Christian* students." Neither the will nor the decree forbids, restricts or limits the use of the property to *Christian* women or students, nor is there anything in the record to indicate that it is the intention of the Salvation Army so to do.

The textatrix' will exhibits the intention to establish a charitable trust for a designated special class of members of the public, a limitation generally permitted in the absence of designation of specific individuals. The class designated does not contravene but is in fact coextensive with the policies of the Salvation Army, which agrees to assume the responsibilities of trust administration consistent with the testatrx' expressed desires. (See *Howard Savings Institute of Newark v. Peep* (N.J. 1961) 170 A 2d 39, 41, 45.) That organization generally is recognized to engage in activities calculated to further the expression of nonsectarian Christian moral and ethical standards. It is well established that the government may neither establish nor interfere with a religion under the pro-

visions of the First and Fourteenth Amendments. (*Walz v. Tax Commissioner of the Cty of New York,* 397 U.S. 664.) Religious sects are entitled to establish and maintain their own parochial education systems, for instance, even though religious segregation in a public school is prohibited. (See *Evans v. Newton,* 382 U.S. 296, 300.) In the same manner it would appear that an organization established and devoted to nonsectarian religious purposes is entitled to receive and administer trust funds on a charitable bequest consistent with its established aims.

Finally, the decree of the trial court takes into consideration the desirability of promoting the testatrix' intentions while at the same time assuring the fullest and best use of the trust funds for the public welfare. Its decree provides in pertinent part, "The Salvation Army or any other trustee is directed to seek out and give preference to those women and girls who fit the description set forth hereinabove. If the classification of beneficiaries proves to be too restrictive, then the trustee should seek further instructions from the court."

Appellants further contend that the trial judge lacked authority and jurisdiction to sit when the matter was heard and determined. On March 13, 1969, and on June 13, 1969, respectively, Judge Faries, "Retired Judge of the Superior Court" was assigned by the Chief Justice of the California Supreme Court Roger J. Traynor, to sit as a superior court judge

from April 1, 1969, to September 30, 1969. The matter came before Judge Faries during this period and was passed upon by him prior to the expiration of his term. The validity of his assignment is established by California Constitution, article VI, section 6.

Appellants cite no authority for their final assignment of error in which they contend that their motion for new trial was improperly denied. The trial court in the sound exercise of its discretion denied the motion and there is no showing of abuse.

The attempted appeal from the order denying motion for a new trial is dismissed. The judgment appealed from is affirmed.

JEFFERSON, J.

We concur:
FILES, P. J.
IRWIN, J.*

*Retired Judge of the Superior Court, assigned by the Chairman of the Judicial Council.

APPENDIX "B"

2nd Civil No. 35977

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ESTATE OF ESTHER ZAHN,
Deceased.

MARGARET ZAHN, PAUL ZAHN and OTTO ZAHN,
Plaintiffs and Appellants,
vs.
SECURITY PACIFIC NATIONAL BANK, Executor, THE SALVATION ARMY, and THE STATE OF CALIFORNIA,
Defendants and Respondents.

Appeal from Superior Court of Los Angeles County
Hon. McIntyre Faries, Judge

PEITION FOR HEARING

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2nd Civil No. 35977

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ESTATE OF ESTHER ZAHN, Deceased.

MARGARET ZAHN, PAUL ZAHN and OTTO ZAHN,
Plaintiffs and Appellants,
vs.
SECURITY PACIFIC NATIONAL BANK, Executor, THE SALVATION ARMY, and THE STATE OF CALIFORNIA,
Defendants and Respondents.

PEITION FOR HEARING

To the Honorable Chief Justice and to the Honorable Associate Justices of the Supreme Court of the State of California:

Your petitioners, Margaret Zahn, Paul Zahn and Otto Zahn, the heirs at law of Esther Zahn, deceased, petition for hearing in this Honorable Court after affirmation of the judgment of the trial court, by the Court of Appeal, Second Appellate District, Division Four, and a decree taking the property which rightfully belongs to appellants and giving it to the Salvation Army, a religious corporation. About $700,000

is involved of which at least $300,000 should and would go to the State of California, upon reversal and of which it is deprived in inheritance tax, by reason of the decisions in the courts below, unconstitutionally in violation of Article I, section 8, clause 3 of the Constitution of the United States, and of the Fifth and Fourteenth Amendments; *Atlanta Motel v. U. S.*, 379 U.S. 241.

Important constitutional and statutory questions are involved which it is necessary to decide to establish uniformity of decision and determine rights—the Civil Rights Act of 1964, *Heart of Atlanta Motel v. U. S.*, 379 U.S. 241, under Section 53 of the Civil Code of California, Section 2279 of the Civil Code of California, and due process of law guaranteed by the Fourteenth Amendment, U. S. Constitution, and to correct misstatement of facts in the opinion of the court below.

People v. Davis, 147 Cal. 357.

THE FACTS

Esther Zahn died August 3, 1967. She left a holographic will with no residuary clause. The property upon her death, consisting of two parcels of real estate and a number of trust deeds therefore automatically vested in the heirs at law upon her death "subject to administration." *Janin v. Brown,* 59 Cal. 37; *Woodworth's Estate,* 31 Cal. 595, 604; Sec. 2, Bancroft's Probate Practice.

Miss Zahn's will was duly filed for probate and admitted without contest. The Farmer's and Merchant's Bank, later merged into the Security Pacific National Bank became executor and Marcus Muskat its attorney. On May 31, 1968, Mr. Muskat, on behalf of the executor, filed a petition to determine interest in the estate (RT 48). The heirs at law live in Germany, they filed their Statement of Interest, H. A. Gebhardt, was called as an expert to give his opinion as to whether Germans (West or East Germans) can receive property from the United States and from California. He testified they could (RT 55) (Both West and East). He cited *Zachernig v. Miller,* 19 L.ed. 2d 688, 88 Sup.Ct. 66 (RT 59). Thereafter the issue did not arise.

The Salvation Army was not an heir. Nor was the attorney general. Neither had standing to participate unless the will legally provided for a general charitable disposition. On the contrary it showed that the decedent wanted to build a "rest home" in memory of her father and mother on the particular location at 3503 S. Flower Street, Los Angeles. On its face the will contained no charitable intent or disposition. A bank—not the Salvation Army—was named as executor of the will. The Salvation Army was mentioned in paragraphs three and four of the will . Paragraph three, as will hereafter be seen, provided only that "perhaps" the Salvation Army can *recommend* women, non-drinkers or smokers, to live in the rest home as

a memorial to her father and mother Miss Zahn proposed to be built. That's all. Paragraph four provided for a music home in the other house Miss Zahn owned, but which was zoned so that it was not possible at that location, by reason of which the gift lapsed.

Prior to Miss Zahn's death, the Hoover Redevelopment project had designated her two story house at 3503 South Flower Street, Los Angeles within the area it was taking for the University of Southern California (TR 82). Miss Zahn had planned a rest home of many rooms (a public housing) in memory of her father and mother for this location and she planned to live in the upper part of it herself (RT 249-255). Rest homes are traditionally now operated for profit and are not charitable institutions. (See telephone directory yellow pages under "rest homes"). They are inns for accommodating the public with housing and food and in some cases, with medical attention.

Miss Zahn had a rendition made for a proposed structure and took it to the Hoover Redevelopment and also to certain city councilmen, but never went ahead with it prior to her death (RT 258-261).

Before she died, the State Legislature of California adopted Section 53 of the Civil Code declaring void any document relating to real estate which contained restrictive covenants of any kind, including religion, nativity, and other discriminative features. Appellant contends the will, as written by Miss Zahn, is

thereafter illegal and void, that she died intestate and only her heirs are entitled to inherit, that by reason thereof neither the attorney general nor the Salvation Army have had or have standing to participate, and that distribution must be made to the heirs.

California has no cy pres statute as does Florida and some other states. Instead, it has a specific statute, to-wit Section 2279 Civil Code providing.

> "§2279. Extinguishment
>
> "TRUST, HOW EXTINGUISHED. A trust is extinguished by the entire fulfillment of its object, or by such object becoming impossible or unlawful. (Enacted 1872.)"

Appellants contend that probate proceedings are State Action within the meaning of the Fourteenth Amendment, U. S. Constitution, and that taking the property from the heirs and giving it to the Salvation Army is violative of due process of law guaranteed by the Constitution of the United States. *Reither v. Murdock,* 135 Cal. 197; *Toland v. Earl,* 129 Cal. 148; *Strong's Estate,* 119 Cal 663; *Buckley v. Superior Court,* 102 Cal. 6.

Appellant further contends that the limitations and restrictions in the will are void as against public policy, due process of law and the equal protection of the laws guaranteed by the Fourteenth Amendment, U. S. Constitution in that the proposed "rest home" contains restrictive covenants against six (only women are to be allowed the use of the proposed rest home);

against religion, restricting it to "Christian women"; (Jewish girls and women, Orientals of Buddhist, Mohammedan and other faiths are to be barred) against smokers and drinkers; against any but *Native* Californians. Also against public policy of today and yesterday.

Section 53, Civil Code of California;
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4A Scott, The Law of Trusts, §339, p. 3085 (3rd ed., 1967);
Pedrotti v. Marin County, California, 152 F. 2d 829, 831;
Atlanta Motel v. U. S., 379 U.S. 241; 13 L.ed. 2d 258.

Appellant also contends the will violates Article I, Section 8, Clause 3 of the U. S. Constitution, Title II of the Civil Rights Act, Section 201(a) and the due process and equal protection clause of the Fourteenth Amendment, U. S. Constitution and therefore cannot be sustained.

Atlanta Motel v. U. S., 379 U.S. 241, 13 L.ed. 2d 258;
Civil Rights Act of 1964, Title II, Sec. 201;
Katzenbach v. McClung, 379 U.S. 294, 13 L. ed. 2d 1290;
U. S. v. Darby, 312 U.S. 100, 85 L.ed. 609.

The trial judge, born in China from an old missionary family, had been elected and retired during his term of office. Thereafter he was called back from retirement. No consent of the parties was secured, as required by the Constitution of pro-tem judges. Appellant raised his disqualification before him and on appeal, contending his judgment is void, and that any retired judge, called back, must have a written consent of the parties. The Court of Appeal held otherwise.

Appellants assign the following errors in the opinion of the Court of Appeal:

I

The Court of Appeal erred in holding that the will of the testator shows a general charitable intent. On the contrary it shows a limited and exclusive intent to build a "rest home" in memory of her mother and father who lived there and where she wanted to live when built. A rest home is a commercial non-charitable object.

The Court of Appeal misstated the facts in its opinion and failed to correct them on petition for rehearing. Miss Zahn was fully aware of the Hoover Redevelopment that was to take her property. She had a rendering of which she wanted to build there.

II

The will made provisions for a "rest home", a housing accommodation, highly discriminatory in

respect to religion, the male sex, national origin (limited to native Californians) and therefore violated Article I, Section 8, subdivision 3, U. S. Constitution, and title II, section 201(a) of the Civil Rights Act of 1964.

III

The Court of Appeal erred in holding the will does not violate Section 53 of the Civil Code of California. The will contains restrictive covenants, to-wit: restrictions for occupancy to solely women, not men; to Christian women; to non-smokers, non-drinkers of the female sex (males barred) to Native Californians; to "deserving citizens who are native Californians". Even as a commercial, non-charitable housing project such restrictions in addition to violating Section 53 of the Civil Code of California, violates the Fourteenth Amendment, U. S. Constitution and the Commerce Clause, Article I, Section 8, subdivision 3 in its restrictions, (*Atlanta v. U. S.*, 379 U.S. 241) and render the provisions of the will illegal.

IV

The Court of Appeal erred in holding that the taking of the property at 3503 South Flower Street by the Hoover Redevelopment for USC and the zoning restriction regarding 4701 Keniston Avenue, Los Angeles, did not adeem the gifts in the proposed paragraphs three and four of the will. It further erred in holding that Section 2279 of the Civil Code of Cali-

fornia did not govern both properties under the facts of this case. The Court of Appeal erred in holding that the cy pres doctrine prevailed over Section 2279 of the Civil Code or had any application in this case.

V

The Court of Appeal erred in holding that the Salvation Army, a religious proselyting organization could take the property by a decree of court, State action within the Fourteenth Amendment, and that such order does not violate due process of law and the equal protection of the laws guaranteed by the Fourteenth Amendment, U. S. Constitution.

I

The Court of Appeal Erred in Holding That the Will of the Testator Shows a General Charitable Intent. On the Contrary it Shows a Limited and Exclusive Intent to Build a "Rest Home" in Memory of her Mother and Father Who Lived There and Where She Wanted to Live When Built. A Rest Home Is a Commercial Non-Charitable Object. The Court of Appeal Misstated the Facts in its Opinion ad Failed to Correct Them on Petition for Rehearing. Miss Zahn Was Fully Aware of the Hoover Redevelopment That Was to Take Her Property. She Had a Rendering of Which She Wanted to Build There.

There is nothing about paragraph three that designates the location of 3503 South Flower Street for

a "rest home" housing accommodation as charitable. The yellow telephone directory for Los Angeles and vicinity contains three pages of listings and advertisements of "rest homes." They are commercial. None appear to be charitable. The Salvation Army isn't even listed.

Miss Zahn only mentioned the Salvation Army to suggest the names of possible tenants who might be "native Californians and Christians who do not smoke or drink and are deserving *citizens.*" (No foreigners, Jews, Mohammedans, Chinese; Hindus, Mexican "Chicanos," Japanese women who travel and therefore are not native Californians and a host of others would be barred who were not native Californians. Section 53, Civil Code of California and the Civil Rights Act of 1964 void such an instrument, as does Title II, Section 201(a), Civil Rights Act of 1964.

The will also discriminates against males—men and boys, limiting its provisions to Christian women and girls.

The will's provisions are non-charitable, and they are also on all fours with the case of *Pedrotti v. Marin County,* (California), 152 F. 2d 829, in which the court held that the gift as a *memorial* was non-charitable.

> "On November 9, 1933, Matthias Joseph Pedrotti died, leaving a will which contained the following provision:
>
> ". . .
>
> "'This gift to said County of Marin is given in memory of my deceased wife, Henrietta G.

Pedrotti, and said ranch shall upon its distribution to said County of Marin, be known as, and called the "Henrietta G. Pedrotti Memorial Farm."

"'. . . .'

"Pursuant to the order of distribution, the County of Marin took possession of the said Pedrotti Ranch and held the same until the taking thereof by the United States under condemnation proceedings.

"In our opinion, the principal result the testator sought to accomplish was to preserve this home ranch as a perpetual memorial to his deceased wife. He indicated that so long as the county held the land for this specific purpose, it might use any income therefrom to help its needy residents. This provision that any net income should be used for charitable purposes was not the primary object of the trust but a mere incident inserted in the instrument of devise to avoid any inhibitions against perpetuities which possibly might be urged under the California Constitution, Art. XX, Section 9, against the establishment of this particular memorial.

"It appears clear to us that this donation of the income for charitable uses was not the main purpose of the trust but only an incident designed to make more certain that the intention of the testator that the home ranch be kept as a memorial to the testator's deceased wife would be carried out. Moreover, the prohibition against any sale or mortgage and the provision that any attempt to sell or mortgage would cause a forfeiture of the

property is also persuasive that the main object of the trust was the establishment of the Henrietta Pedrotti Memorial rather than the charitable uses suggested."

II

The Will Made Provisions for a "Rest Home," a Housing Accommodation, Highly Discriminatory in Respect to Religion, the Male Sex, National Origin (Limited to Native Californians) and Therefore Violated Article I, Section 8, Subdivision 3, U.S. Constitution, and Title II, Section 201(a) of the Civil Rights Act of 1964.

The terms of the will are full of racial discrimination in violation of Article I, Section 8, Clause 3 of the Constitution of the United States, the Civil Rights Act of 1964, Title II, Section 201(a) and the due process and equal protection clauses of the 14th Amendment U. S. Constitution. It is therefore void as against public policy.

Thus the will provides for a rest home for women and girls, solely of the Christian religion. Thus girls or women of Jewish faith, Orientals who are Mohammedans, Buddists or any other religion going to USC and seeking the accommodations proposed in the will would be excluded. The purpose of the proposed rest home was of course to afford public accommodations highly limited within the scope of the designations in the will. These homes serve meals.

The stated purpose of the Civil Rights Act was to "promote the general welfare by eliminating discrimination based on race, color, religion or national origin in public accommodations . . ."

Atlanta Motel vs. U. S., 379 U.S. 241, 245; 13 L. Ed. (2) 258, 262.

". . . Mr. Justice Bradley inferentially found that innkeepers 'by the laws of all the states, so far as we are aware, are bound, to the extent of their facilities to furnish proper accommodation to all unobjectionable persons who in good faith apply for them. 109 U.S. 25; 27 L.ed. 844." *Atlanta Motel v. U.S., supra,* 260.

". . . . Congress may—as it has—prohibit racial discrimination by motels serving travelers, however local their operations may appear."

The court further points out that if the means selected to eliminate racial discrimination are reasonable and appropriate then a housing accommodation has no right to select its guests as it sees fit, free from governmental regulation. 379 U.S. 241, 258; 13 L.ed. (2) 258, 269.

Katzenbach v. McClung, 379 U.S. 294; 13 L. ed (2) 290

U.S. v. Darby, 312 U.S. 100

The provisions of the will are therefore illegal and against public policy.

Jeffries v. Alexander, 8 H.L.C. 594, 648;

Board of County Commissioners v. Scott, 88 Minn. 386, 93 N.W. 109;

Matter of Estate of Hill, 119 Washington 62; 204 Pac. 1055.

Appellants Margaret Zahn, Paul Zahn and Otto Zahn petition for hearing in this court on the grounds that the court erred in its statement of facts, rewrote the decedent's will, and ignored constitutional and statutory rights of appellants. The court took property that should belong to appellants, as heirs at law and blood relations, gave away property that should go partly to them as heirs at law and partly to the State in inheritance and other taxes and gave it to the Salvation Army, a religious corporation, in a laudatory opinion of the Salvation Army, but in violation of the Civil Rights Act of 1964, Sec. 201(a), Article I, Sec. 8, Subdivision 3 of the Constitution and due process of law and equal protection of the law guaranteed by the Fifth and Fourteenth Amendments U. S. Constitution.

The court also ratified the acts of a retired and thus pro tem judge without the written consent of the litigants, rendering his gift of property that vests in the heirs at death to the Salvation Army void.

Contrary to the opinion of the Court of Appeal, neither the will nor extrinsic evidence showed any *general charitable* intent, much less one to give the property at 3503 South Flower Street, and all trust deeds (amounting to $600,000 to $700,000) to the Salvation Army, a religious corporation, tax free, nor a plaque in place of a music school.

According to the will, and the testimony of her friends, Miss Zahn wanted to build a "rest home" at the particular location in memory of her father and mother and to live there herself. She restricted the occupancy to *CHRISTIAN* WOMEN and to NATIVE CALIFORNIANS. These were restrictive covenants in violation of Section 53 of the Civil Code of California, the Civil Rights Act of 1964, Article I, Section 8, Subdivision 3. U.S. Constitution and the Fourteenth Amendment to the Constitution of the United States and ignored and nullified their provisions. Section 53 Civil Code is not restricted to municipality on trust. The law (Sec. 53) clearly nullifies any document containing a restrictive covenant such as in this will. See also *Evans v. Abney,* 396 U.S. 435. Probate proceedings are state action necessary to make the will operative.

The trial judge, although he had retired, is presumed to have known the state and federal law (Section 53) and the Civil Rights Act existing at the time of trial, but he ignored the forbidden statutes, just as the appellate court has done. Besides, an illegal and therefore void judgment is a dead limb on the judicial tree (*People v. Greene,* 74 Cal. 400) and should be lopped off. Paragraphs 3 and 4 of the decedent's will provide:

> "I want to start a Rest Home at the corner 3503 So. Flower St., Los Angeles, California for Christian women and girls who have no relatives, no smokers or drinkers only deserving citizens

who are Native Californians. Perhaps the Salvation Army can recommend them. I would like a new Modern Building to be erected at the corner of 3503 So. Flower St., Los Angeles, Cal. to be called 'The Zahn Memorial.' *This in memory of my father and mother Paul and Louisa Zahn* who came to Los Angeles, Cal. in 1887. There are enough 1st Trust Deeds and Real Estate to sell and money to start a new Building.

"My home at 4701 Keniston Ave., Los Angeles, Cal. not to be sold. I wish to will to the Salvation Army to be used as a Music Home for Deserving *Christian* Students in my memory."

Nothing there even remotely suggested a charitable intent or a total gift to the Salvation Army. It was strictly a "rest home"—a housing accommodation—in memory of her father and mother, and restricted to Christian *Women* who did not smoke or drink and *Native Californians.* Neither Jewish women and girls, Mohammedans, Buddists or others of other non-Christian faiths would be eligible.

III

The Court of Appeal Erred in Holding the Will Does Not Violate Section 53 of the Civil Code of California.

Pursuant to Section 53 of the Civil Code, as added by Statutes of 1961, Ch. 1877, p. 3976, Section 1, as amended by Statutes of 1965, Ch. 299, p. 1356, Section 6, operative January 1, 1967, paragraphs three and

four of Miss Zahn's will are void and the State has no legal power to make them valid through probate action or on appeal. That section reads as follows:

"§53. Restrictions upon transfer or use of realty because of race, *color, religion,* ancestry or *national origin.*

"(a) Every provision in a written instrument relating to real property which purports to forbid or restrict the conveyance, encumbrance, leasing, or mortgaging of such real property to any person of a specified race, color, *religion.* ancestry, or *national origin,* is void and every restriction or prohibition as to the use or occupation of real property because of the user's or occupier's race, color, *religion,* ancestry, or *national origin* is void.

"(b) Every restriction or prohibition, whether by way of covenant, condition upon use or occupation, or upon transfer of title to real property, which restriction or prohibition directly or indirectly limits the acquisition, use or occupation of such property because of the acquirer's, user's, or occupier's race, color, religion, ancestry, or national origin is void.

"(c) In any action to declare that a restriction or prohibition specified in subdivision (a) or (b) of this section is void, the court takes judicia. notice of the recorded instrument or instruments containing such prohibitions or restrictions in the same manner that it takes judicial notice of the matters listed in Section 452 of the Evidence Code. (Added Stats, 1961, c. 1877, p. 3976, §1, as amended Stats. 1965, c. 299, p. 1356, §6, operative Jan. 1, 1967.)" (Emphasis added.)

The foregoing statute implements the equal protection clause of the Fourteenth Amendment to the Constitution of the United States and the Civil Rights Act of 1964, Sec. 201(a).

Judicial enforcement of the clauses contained in paragraphs three and four therefore are against public policy and deny equal protection of the laws and acts of the State courts in doing so cannot stand.

Shelley v. Kraemer, 334 U.S. 1, 23, 92 L. ed. 1161;
Hurd v. Hodge, 334 U.S. 24; 36, 92 L. ed. 1187.

The clauses would also violate the Fifth Amendment as incorporated into the Fourteenth Amendment and the Civil Rights Act of 1964.

Hurd v. Hodge, supra;
Atlanta v. U. S., 379 U.S. 241.

Esther Zahn died August 3, 1967 (C.T. 47). A will takes effect on death. The section of the Civil Code (Sec. 53, effective January 1, 1967) therefore governs completely the property involved.

Title II, Section 201(a) Civil Rights Act of 1964 and Title 42, Section 1982, U. S. Code, and the Fourteenth Amendment to the Constitution of the United States allow equal opportunity in housing and forbid discriminatory practices.

Her will provided that she wanted to start a "rest home" at the corner of 3503 South Flower Street, Los

Angeles, California, for *Christian women and girls,* a restriction which is forbidden by U. S. Constitution, the Civil Rights Act of 1964 and by Section 53 of the Civil Code. She further provides that they should only be deserving citizens who are *Native Californians,* thus restricting the provisions of the will to persons of sole California State origin of "Christian women and girls who have no relatives, no smokers or drinkers, only deserving citizens who are Native Californians."

This provision is therefore void and the additional gifts of first trust deeds and real estate to sell to raise money to start the building so provided are therefore void and revert to the heirs.

Paragraph four of the will contains the same illegal restriction provided as follows:

> "My home at 4701 Keniston Avenue not to be sold. I wish to will to the Salvation Army to be used as a music home for deserving *Christian* students in my memory." (Emphasis added.)

Both the restrictions in paragraph three and paragraph four are therefore void as being a restriction or provision which directly or indirectly limits the acquisition, use or occupancy of such property because of the acquiror's religion, and violates due process of law and the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Civil Code, Section 53, as amended:

Shelley v. Kraemer, 334 U.S. 1, 92 L.ed. 1161;
Atlanta v. U.S., 379 U.S. 241.

A careful reading of Esther Zahn's will showed that she appointed a well known *bank* (not the Salvation Army) to act as her executor. No testamentary trust was set up. Her statement in the holographic will that she wanted to *start* a "rest home" for women and girls in nowise sets up a trust and does not designate the Salvation Army either as trustee or to operate the same. Her objective is so restrictive itself as to negative any *charitable intent.* She does not say she wants to start a "non-profit" rest home open to the general public. Apparently her idea is to start one and to use her trust deeds to build it for profit, as rest homes are generally operated, and to have income from it that would pay for the rest of the construction and for operating costs. She has made no provision for any operations.

In expressing "girls" for the rest home, it would seem to indicate possibly girls who might go to the University a block away and then she merely expresses a view that she wants it to be a Zahn memorial in memory of her father and her mother. This is not a charity nor does it show any charitable intent. Restricting it to one religion voids the document under Section 53 and possibly because it is limited to women could also void it under the Civil Rights Act and under the right to equal opportunity for both sexes.

It takes no extrinsic evidence to explain or clarify the word "Christian" in paragraphs three and four

of the will as a religious restriction. The words "Christian women and girls" in paragraph three need no extrinsic evidence and the words "deserving Christian students" and "Native Californians" in paragraph four need no extrinsic evidence to show that the same are in violation of Section 53 of the Civil Code, as amended in 1965.

The Court of Appeal and trial court also ignored Section 2279 Civil Code of California.

California has no code provision regarding the doctrine of cy pres, as has Florida and some other states. It was implemented judicially in California. Insofar as the facts of this case are concerned it has no application and is contrary to the statutory provisions of Section 2279 which have never been repealed. Ignoring Section 2279 Civil Code in this case is to ignore the law to make an illegal gift to the Salvation Army and deprive the state of about $300,000. The state which is impartial in its charity and application of funds to welfare is in need more than the Salvation Army.

The court erred in its statements that Miss Zahn was unaware of the Hoover redevelopment.

As to the Hoover Redevelopment Project, it was adopted and approved by the City of Los Angeles on January 26, 1966. The City Council adopted Ordinance 131730, thereby adopting the plan.

Miss Zahn was fully aware of the same, went to the Hoover Redevelopment and gave them a render-

ing of what she wished (R.T. 258). She went to the offices of three City Councilmen and she went to the Urban Redevelopment offices and went to the offices of the government people that were here on the Hoover Redevelopment (R. T. 260). She had some papers with her. On one occasion she talked to several different men and showed these sketches. They were sketches of a building she wished to have put up on the old home at 35th and Flower (R. T. 261). They were pencil drawings. She had somebody do the sketches. It was a rendering (R. T. 261).

IV

The Court of Appeal Erred in Holding that the Taking of the Property at 3503 South Flower Street by the Hoover Redevelopment for USC Did not Adeem the Gift in the Proposed Paragraph Three and Four of the Will. It Further Erred in Holding that Section 2279 of the Civil Code of California Did not Govern Under the Facts of this Case. The Court of Appeal Erred in Holding that the Cy Pres Doctrine Prevailed over Section 2279 of the Civil Code or Had any Application in this Case.

Miss Zahn knew before she passed away that the Hoover Redevelopment was taking the property at 3503 South Flower Street, which was the old family home that she got in termination of the joint tenancy with her father (R. T. 164). She lived there before she moved to the new home at 4701 Keniston Avenue.

Miss Zahn visited the Hoover Redevelopment before her death and apparently had some proposal which was never found or produced. In any event, Miss Zahn did not pursue anything regarding this property, which was located at the southwest corner of 35th and Flower Street near the University of Southern California.

During her lifetime she had told Miss Dorothy Austin, a real estate lady acquaintance. that she had sketches for a building to be used for young women (R. T. 250). "She will have an apartment on the top floor. She will be able to be with young women which we do not now have in our area." (R. T. 249). This was in 1960. In talking of the Hoover Urban Renewal she said

> "I will someday be living here. I will have an apartment for myself with the larger part of the building to be used for a home away from home for girls so that they will have a safe place to live . . ." (R. T. 255).

She accompanied Miss Zahn to the Hoover Redevelopment office (R. T. 258). She doesn't recall the year. It was about the time of the hearings in the City Council chambers. She went down with Miss Zahn to the hearings three or four times. She had sketches of a building (R. T. 260-261). She had papers, pencil drawings, that she had someone do. It was a building of some sort. It was a rendering (R. T. 261).

Miss Zahn's plans apparently were never fully presented to the Hoover Urban Redevelopment and she did not change her will after knowledge that the Hoover Redevelopment was going to take the property and that it was to be sold to them. The agreement of sale was made prior to her death and concluded in probate.

Miss Zahn's will contained no residuary clause (C. T. 40).

Before she died, the property was taken by the Hoover Redevelopment and no longer existed for the purposes specified in Miss Zahn's will. She knew that it was to be taken because she visited the Hoover Redevelopment herself on three or four occasions. The bequest was specific both as to the property to be used at 3503 South Flower Street and about the use of the money from her trust deeds and other property she had. Clearly, the testatrix intended to use the described land as a part of a rest home at the location and to use the money and property of her trust deeds so far as it would go for that purpose. When the Hoover Redevelopment took this property, there was an ademption and at the time of her death it no longer existed.

In *Estate of Sullivan,* 128 Cal. App. 2d 144, 274 P. 2d 946, the court said:

> "Where the bequest relates to realty, the following rule appears to be applicable: 'Where specifically described land, or a part or share thereof,

is itself devised, or where the proceeds of particularly designated land are the actual subject of the bequest, *or where certain land is designated as the exclusive source for the payment of a legacy,* the gift is specific.' " (57 Am. Jur., Wills, §1413).

"As stated in Estate of Goodfellow, 166 Cal. 409, 415 [137 P. 12]: '. . . . ademption is merely one of the ways in which a legacy lapses. One of the best definitions is found in Kramer v. Kramer, 201 F. 248, 250 [119 C. C. A. 482]. . . .'"

Both properties had ceased to exist for the purposes indicated by Miss Zahn by the time of her death. Section 2279 of the Civil Code provides that if a trust cannot be performed by reason of its being unlawful or impossible to carry out, it is extinguished by reason of the provisions of Section 2279 of the Civil Code. The court ignored this provision in its findings.

The case would be on all fours with *Evans v. Abney,* supra, decided January 26, 1970, where the court held that Senator Bacon's will could not be carried out according to his specific terms and bequest and therefore the doctrine of cy pres could not apply. The court said:

"Professor Scott in his treatise on trusts states this limitation on the doctrine of cy pres which is common to many States as follows:

" 'It is not true that a charitable trust never fails where it is impossible to carry out the particular purpose of the testator. In some cases . . . it appears that the accomplishment of the particu-

lar purpose and only that purpose was desired by the testator and that he had no more general charitable intent and that he would presumably have preferred to have the whole trust fail if the particular purpose is impossible of accomplishment. In such a case the cy pres doctrine is not applicable.' 4 A Scott, The Law of Trusts §399, p. 3085 (3d ed. 1967)."

In California there is no cy pres statute but Section 2279 of the Civil Code provides specifically that where it is impossible to carry out the particular purpose of the testator and only that purpose was desired by the testator that he had no more general charitable intent and would have preferred to have the whole trust fail if the particular purpose is impossible of accomplishment.

From the evidence in this case, it was very evident that Miss Zahn desired to have a "rest home" a block away from U.S.C. where she could live along with the girls for whom rooms were rented or provided and that when this specific intent could not be carried out, she provided for no other purpose. She at no time specified that the money was to go to the Salvation Army or that a trust was to be created for their benefit or anyone else's benefit, and from the fact that she visited the Hoover Redevelopment herself on three or four occasions and did not proceed with any plans of her own that she intended the project to fail if this particular purpose was impossible of accomplishment.

In such a case, under Georgia law, even the cy pres doctrine would not be applicable.

Evans v. Abney, 396 U.S. 441.

Likewise, the home for a music school had lapsed and it fell along with the other bequests. We cannot help but pause and state that at no time have we seen rest homes in the position of charities.

V

The Court of Appeal Erred in Holding that the Salvation Army, a Religious Proselyting Organization Could Take the Property by a Decree of Court, State Action Within the Fourteenth Amendment, and that such Order Does not Violate Due Process of Law and the Equal Protection of the Laws Guaranteed by the Fourteenth Amendment, U.S. Constitution.

The Salvation Army is a religious organization confined to the Christian religion and limited in its scope to proselyting for the conversion of persons to that religion. The Fourteenth Amendment to the Constitution of the United States forbids the gift to such a limited religious organization in perpetuity without the payment of any taxes and compelling other taxpayers of other religions to make up what they do not pay. We deem that such an attempted gift falls within the provisions of the Fourteenth Amendment to the Constitution of the United States.

See: *Evans v. Abney,* 396 U.S. 435, et seq.

CONCLUSION

WHEREFORE, the heirs at law pray for hearing in this court and that this Honorable Court reverse the judgment and order below; that it find Esther Zahn died intestate and that all of the properties, except the specific distribution to August Hansen and the Care packages so far carried out, be distributed to the heirs at law.

Respectfully submitted,

MORRIS LAVINE
Attorney for Appellants

APPENDIX "C"

2nd Civil No. 35977

IN THE COURT OF APPEAL
SECOND APPELLATE DISTRICT
STATE OF CALIFORNIA

In the Matter of the Estate of ESTHER ZAHN, also known as ESTHER LOUISA ZAHN,
Deceased.

MARGARET ZAHN, also known as MARGARETE CLARA ZAHN, PAUL ZAHN and OTTO ZAHN,
Appellants,

vs.

SECURITY PACIFIC NATIONAL BANK, Executor of the Estate of ESTHER ZAHN; THE SALVATION ARMY; and THE STATE OF CALIFORNIA,
Respondents.

Appeal from the Superior Court of Los Angeles County
Hon. McIntyre Faries, Judge

APPELLANTS' CLOSING BRIEF IN COURT OF APPEAL

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IN THE COURT OF APPEAL

SECOND APPELLATE DISTRICT

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APPELLANTS' CLOSING BRIEF IN COURT OF APPEAL

To the Honorable Court of Appeal, Second Appellate District, State of California:

We reply herewith to the several briefs filed by the respondents in the above entitled case. Since this

was a petition to determine heirship, neither the Attorney General nor the Salvation have standing in this matter unless the will involves a valid charitable bequest, or bequests. The will on its face does not so provide.

Appellants deem that Section 53 of the Civil Code, as amended by Stats. 1965, Ch. 299, p. 1356, Section 6, is decisive of this appeal.

Pursuant to Section 53 of the Civil Code, as added by Statutes of 1961, Ch. 1877, p. 3976, Section 1, as amended by Statutes of 1965, Ch. 299, p. 1356, Section 6, operative January 1, 1967, paragraphs three and four of Miss Zahn's will are void. That section reads as follows:

> "§53. Restrictions upon transfer or use of realty because of race, color, *religion,* ancestry or *national origin.*
>
> "(a) Every provision in a written instrument relating to real property which purports to forbid or restrict the conveyance, encumbrance, leasing, or mortgaging of such real property to any person of a specified race, color, *religion,* ancestry, or national origin, is void and every restriction or prohibition as to the use or occupation of real property because of the user's or occupier's race, color, *religion,* ancestry, or national origin is void.
>
> "(b) Every restriction or prohibition, whether by way of covenant, condition upon use or occupation, or upon transfer of title to real property, which restriction or prohibition directly or indirectly limits the acquisition, use or occupation of

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"(c) In any action to declare that a restriction or prohibition specified in subdivision (a) or (b) of this section is void, the court takes judicial notice of the recorded instrument or instruments containing such prohibitions or restrictions in the same manner that it takes judicial notice of the matters listed in Section 452 of the Evidence Code. (Added Stats. 1961, c. 1877, p. 3976, §1, as amended Stats. 1965, c. 299, p. 1356, §6, operative Jan. 1, 1967.)" (Emphasis added.)

The foregoing statute implements the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

Judicial enforcement of the clauses contained in paragraphs three and four deny equal protection of the laws and acts of the State courts in doing so cannot stand. (*Shelley v. Kraemer,* 334 US 1, 23, 92 L. ed. 1161; *Hurd v. Hodge,* 334 US 24, 36, 92 L. ed. 1187).

The clauses would also violate the Fifth Amendment as incorporated into the Fourteenth Amendment and the Civil Rights Act. (*Hurd v. Hodge, supra.*)

Esther Zahn died August 3, 1967. (C. T. 47). A will takes effect on death. The section of the Civil Code (Sec. 53, effective January 1, 1967) therefore governs completely the property involved.

Title 42, Section 1982, U. S. Code, and the Fourteenth Amendment to the Constitution of the United States allow equal opportunity in housing and forbid discriminatory practices.

Her will provided that she wanted to start a rest home at the corner of 3503 South Flower Street, Los Angeles, California, for *Christian women and girls,* a *restriction* which is forbidden by Section 53 of the Civil Code. She further provides that they should only be deserving citizens who are Native Californians, thus restricting the provisions of the will to persons of sole origin of "Christian women and girls who have no relatives, no smokers or drinkers, only deserving citizens who are Native Californians."

This provision is therefore void and the additional gifts of first trust deeds and real esate to sell to raise money to start the building so provided are therefore void and revert to the heirs.

Paragraph four of the will contains the same illegal restriction provided as follows: "My home at 4701 Keniston Avenue not to be sold. I wish to will to the Salvation Army to be used as a music home for deserving *Christian students* in my memory." (Emphasis added.)

Both the restrictions in paragraph three and paragraph four are therefore void as being a restriction or provision which directly or indirectly limits the acquisition, use or occupancy of such property because of the acquiror's religion, and violates due process of

law and the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States. (Civil Code, §53. as amended: *Shelley v. Kraemer,* 334 US 1, 92 L. ed. 1161; see: *Commonwealth v. Brown,* 302 F. 2d 120).

The court has, contrary to law, ignored the provisions of Section 53 and rewritten the terms of the will to give the property to the Salvation Army. This was a far cry from any intent of the part of Esther Zahn.

In a recent case entitled *Tooahnippah, Petitioner,* v. Walter J. Hickel, Secretary of the Interior, 25 L. ed.2d 600, No. 300, U.S. Supreme Court, decided April 27, 1970, the Supreme Court of the United States reversed the Secretary of the Interior who disapproved a will of an Indian which failed to provide for the testator's illegitimate daughter. The court held that the administrative decision disapproving an Indian's will was erroneous and that power was not vested in a governmental official to revoke or rewrite a will which reflected a rational testamentary scheme because of the feeling that the disposition was not just and equitable.

In the case before this Court, the Superior Court Judge pro tem rewrote the will of Esther Zahn to give her property to the Salvation Army and to deny the blood relatives the property which should go to them and to deny the State of California its substantial inheritance tax which would result in rewriting the will and giving it to charity.

The effective date of the will is from the date of Esther Zahn's death, which was August 3, 1967. Section 53, as amended and which we have quoted above, became effective January 1, 1967 and in provision (c) of that section the court takes judicial notice of the instruments containing such prohibition or restriction. Esther Zahn's will is set forth at pages 38-40 of the Clerk's transcript.

A careful reading of Esther Zahn's will showed that she appointed a well known bank to act as her executor. No testamentary trust was set up. Her statement in the holographic will that she wanted to *start* a rest home for women and girls in nowise sets up a trust and does not designate the Salvation Army either as trustee or to operate the same. Her objective is so restrictive as to negative any charitable intent. She does not say she wants to start a "non-profit" rest home. Apparently her idea is to start one and to use her trust deeds to build it for profit, as rest homes are generally operated, and to have income from it that would pay for the rest of the construction and for operating costs. She has made no provision for any operations.

In expressing "girls" for the rest home, it would seem to indicate possibly girls who might go to the University a block away and then she merely expresses a view that she wants it to be a Zahn memorial in memory of her father and her mother. This is not a charity nor does it show any charitable intent. Re-

stricting it to one religion voids the document under Section 53 and possibly because it is limited to women could also void it under the Civil Rights Act and under the right to equal opportunity for both sexes.

The Court will not need to reach these other matters if it holds as we contend that Section 53 voids paragraphs three and four of the will the same as if a holographic will omits a date in the document. Under those circumstances, neither the Salvation Army nor the Attorney General has any standing in this case and the order of the Superior Court on those grounds alone require reversal of the judgment and decree.

It takes no extrinsic evidence to explain or clarify the word "Christian" in paragraphs three and four of the will. The words "Christian women and girls" in paragraph three need no extrinsic evidence and the words "deserving Christian students" in paragraph four need no extrinsic evidence to show that the same are in violation of Section 53 of the Civil Code, as amended in 1965.

As to the Hoover Redevelopment Project, it was adopted and approved by the City of Los Angeles on January 26, 1966. The City Council adopted Ordinance No. 131730, thereby adopting the plan.

Miss Zahn, fully aware of the same, went to the Hoover Redevelopment and gave them a rendering of what she wished. (R.T. 258). She went to the offices of three City Councilmen and she went to the Urban Redevelopment offices and went to the offices

of the government people that were here on the Hoover Redevelopment. (R. T. 260). She had some papers with her. On one occasion she talked to several different men and showed these sketches. They were sketches of a building she wished to have put up on the old home at 35th and Flower. (R. T. 261). They were pencil drawings. She had somebody do the sketches. It was a rendering. (R. T. 261).

WHEREFORE, the heirs at law pray that this Honorable Court reverse the judgment and order below; that it find that Esther Zahn died intestate and that all of the properties, except the specific distribution to August Hansen and the Care packages so far carried out, be distributed to the heirs at law.

Respectfully submitted,

MORRIS LAVINE
Attorney for Appellants

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1971
No. 35977

71 - 289

ESTATE OF ESTHER ZAHN,

Deceased.

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and OTTO ZAHN,

Plaintiffs and Appellants,

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and THE STATE OF CALIFORNIA,

Defendants and Respondents.

RESPONSE OF THE SALVATION ARMY TO THE PETITION FOR WRIT OF CERTIORARI

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RESPONSE OF THE SALVATION ARMY TO THE PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE WARREN BURGER, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

LACK OF SPECIAL OR IMPORTANT REASONS.

The thrust of this petition is that the holographic will of the decedent contained "restrictive covenants." This inaccurate legal language is designed to attract the attention of this Court, causing it to believe that there may have been some violation of the Constitution of the United States. There was no violation. This will be demonstrated by the following analysis of this petition and the opinion of the California Court of Appeal.

The petitioners propose ten questions which they asserted would be presented to this Court. (See pages 9 to 11.) These ten (10) points may be simply condensed into the following three (3) questions:

1. Did the Will contain "restrictive covenants"? (Questions 1, 2, 3, 4, and 5.)

2. Did the Will and evidence adduced at the trial show a general charitable intent: (Question 7) ?

3. Was the cy pres doctrine applicable? (Questions 3, 4, 5, 6, 9, 10.)

All of these points have been considered by the California Courts and their opinion was expressed by Justice Jefferson of the California Court of Appeal. (See Appendix A to the Petition for Certiorari.)

THE RESTRICTIVE COVENANTS

On the question of the mislabeled "restrictive covenants" the Court of Appeal said:

> "Neither the Will nor the Decree forbids, restricts, or limits the use of the property to Christian women or students, nor is there anything in the record to indicate that it is in the intention of the Salvation Army to do so." (See Appendix page 13.)

The court later said:

> "Its decree provides in pertinent part, 'The Salvation Army or any other trustee is directed to seek out and give . . . preference to those woman and girls who fit the description set forth hereinabove. If the classification of beneficiaries proves to be too restrictive, then the trustee should seek further instructions from the court.' . . . ." (See page 14 of the Appendix.)

The petitioners' assertion that there is a restrictive use of the decedent's property is erroneous, not founded on any fact, nor do petitioners point to any portion of the record that would sustain their contention. It is devoid of merit.

THE GENERAL CHARITABLE INTENT

On the question of whether the Will and the evidence adduced at the trial showed a general charitable intent by the testatrix, the Court of Appeal said:

> "The record is replete with evidence and testimony extrinsic to the will which supports the trial court's finding that the testatrix demonstrated a general charitable intention in establishing these gifts. The fact that the . . . [testatrix] may have been motivated by a desire to perpetuate the memory of named persons does not necessarily destroy the charitable character of the bequest . . . . ." (See Appendix page 9.)

The petitioners' contention that "the will was non-charitable on its face" (Petition page 2) and that, "It (the California courts) arbitrarily and capriciously took the property and gave it to the Salvation Army. . . ." (see Petition page 3) is without merit.

THE CY PRES DOCTRINE

On the question of whether the cy pres doctrine was applicable, the Court of Appeal said:

"Appellant's first three assignments of error involve the same issue: Were the gifts of the Flower Street and Keniston Street residence and the assets designated for use incidental thereto, specific gifts which were adeemed, or does the doctrine of cy pres apply to preserve the testatrix' charitable intentions and prevent these assets from passing intestate with the residue?"

The Court of Appeal in deciding this question said:

"Appellants argue on the ground that the restriction on the use of the testatrix' property is invalid and renders the charitable bequest void or lapsed. Civil Section 2279, however, has no application to the present case. The rule of cy pres is one of construction, the object of which is to permit the main purpose of the donor of a charitable trust to be carried out as nearly as may be where it cannot be done to the letter -- the trust will not fail but the Court will direct the application of of the property to some charitable purpose which falls within the charitable intention of the settlor."

The petitioners have consistently contended that the cy pres doctrine does not apply in California since there is no express statutory

enactment. (See Petition page 14.) However, this common law doctrine has been applied in California since 1881. (See Estate of Hinchley, 58 Cal. 457 at 512.)

THE EVANS CASE

The petitioner previously urged and argued the case of Evans v. Abney, 396 U.S. 435, 24 L. Ed. 2d 634, before the Court of Appeal which rejected the petitioners' interpretation and application of that case to the case at bench. (See Appendix page 11.)

CONCLUSION

The Petition for a Writ of Certiorari does not present any constitutional question for this Court's consideration. It is respectfully urged that the petition should be denied.

Respectfully submitted,

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Attorneys for Respondent
The Salvation Army

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1971
No. 71-289

ESTATE OF ESTHER ZAHN,

Deceased.

MARGARET ZAHN, PAUL ZAHN
and OTTO ZAHN,

Plaintiffs and Appellants,

vs.

SECURITY PACIFIC NATIONAL BANK,
Executor, THE SALVATION ARMY,
and THE STATE OF CALIFORNIA,

Defendants and Respondents.

PETITION FOR REHEARING

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Defendants and Respondents.

PETITION FOR REHEARING

We petition for rehearing of the order of November 9, 1971 denying certiorari.

The will denies the equal protection of the laws guaranteed by the Fourteenth Amendment of the United States Constitution, and is in conflict with earlier and later decisions of the Supreme Court, and the Fair Housing Act of 1964.

42 U.S.C. §2000a-1.

On November 22, 1971, Mr. Chief Justice Burger said in Reed v. Reed, No. 70-4 as follows:

> "The Equal Protection Clause of that Amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). . . . "
>
> * * * * * * * * *
>
> "The objective of §14-312 clearly is to establish degrees of entitlement of various classes of persons in accordance with their varying degrees and kinds of relationship to the intestate. Regardless of their sex, persons within any one of the enumerated classes of that section are similarly situated with respect to that objective. By providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause. Royster Guano Co. v. Virginia, supra."

The language of the will, paragraph three is as follows:

> "I want to start a Rest Home at the corner 3503 So. Flower St. Los Angeles, California for Christian women and girls who have no relatives, no smokers or drinkers only deserving citizens who are Native Californians. Perhaps the Salvation Army can recommend them. I would like a new Modern Building to be erected at the corner of 3503 So. Flower St. Los Angeles, Cal to be called 'The Zahn Memorial.' This is memory of my father and mother Paul and Louisa Zahn who came to Los Angeles Cal in 1887. There are enough 1st Trust Deeds and real Estate to sell and money to start a new Building."

In Atlanta Motel v. U.S., 379 U.S. 241, the court said:

The stated purpose of the Civil Rights Act was to

> "promote the general welfare by elimintating discrimination based on race, color, religion or national origin in public accommodations. . . ." Atlanta Motel v. U.S., 379 U.S. 241, 245; 13 L. Ed. 2d 258, 262.

> ". . . Mr. Justice Bradley inferentially found that innkeepers 'by the laws of all the states, so far

as we are aware, are bound, to the extent of their facilities to furnish proper accommodation to all unobjectionable persons who in good faith apply for them. 109 U.S. 25; 27 L.ed. 844." Atlanta Motel v. U.S., supra, 260.

". . . Congress may -- as it has -- prohibit racial discrimination by motels serving travelers, however local their operations may appear."

The court further points out that if the means selected to eliminate racial discrimination are reasonable and appropriate then a housing accommodation has no right to select its guests as it sees fit, free from governmental regulation. 379 U.S. 241, 258; 13 L.ed. 2d 258, 269.

Katzenbach v. McClung,
379 U.S. 294; 13 L.ed. 2d 290;

U.S. v. Darby,
312 U.S. 100.

The provisions of the will are therefore illegal and against public policy.

Jeffries v. Alexander,
8 H.L.C. 594, 648;

Board of County Commissioners v. Scott,
88 Minn. 386, 93 N.W. 109.

We pray for rehearing in the light of recent holdings of this court with reference to equal protection and sex discrimination.

Respectfully submitted,

MORRIS LAVINE

Attorney for Petitioners

CERTIFICATE OF COUNSEL

I, counsel of record, hereby certify that this petition for rehearing is filed in good faith and not for delay and is meritorious and based on holdings of this court in later decisions.

MORRIS LAVINE
Attorney for Petitioners